IN THE

Supreme Court of the United States

OCTOBER TERM 1941

NOS. ~~958-959~~ 26-27

HENRY ANTON PFISTER,

Petitioner,

v.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, E. C. HOOK, and EMIL GEEST,

Respondents.

On Application for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Preliminary Statement.

All emphasis in this reply brief is supplied unless otherwise noted.

The Order of This Reply Brief.

This reply brief will reply to the respondents' brief in the same order of that brief, using the paging of the respondents' brief as headings.

Respondents' Brief, Page 1.

Under Heading: "No Special or Important Reasons Exist for Granting Writ of Certiorari in this Case."

The respective assertions by the respondents are contradicted by the following references to the Petition and Brief:

Top of page 2, (not in conflict) and (no departure or sanction of departure from usual course of procedure):

Petition, pages 17 to 25, numbers 6 to 16.

Brief, pages 47 to 49, "Analysis of Cases Referred to by the Appellate Court." Also **Brief,** pages 58 to 69 and 72 to 73, where a total of 59 conflicting decisions are cited with references to discussions of them in the Supplemental Brief; the note at pages 25-26, this reply brief, cites a new one making 60.

Top of page 2 (no federal law not already decided):

Petition pages 14 to 17, paragraphs numbered 1 to 5.

Brief, page 58 ("Specification of Error 1"). **Brief,** page 66 ("Specification of Error 5"). **Brief,** page 67 ("Specification of Error 6", and "Specification of Error 7"). **Brief,** page 70 ("Specification of Error 9"); **Brief,** page 70 ("Specification of Error 11" and "Specification of Error 12"). **Brief,** page 76 ("Specification of Error 13", and "Specification of Error 14"). **Brief,** page 73 ("Specification of Error 15").

Reply to Respondents' Brief, Pages 5 to 6.

Under Heading: "Order of August 13, 1940 (CCA No. 7632)". (This is the order which fixed $6375 rental and an additional $6375 as extra payments making $12,750 to be paid in 2 years, 8 months, and 13 days, and stayed proceedings for three years from April 26, 1940, being for 2 years, 8 months and 13 days. R. 72 to 77.)

1.

THE "FIRST OBJECTION".

Respondents' Brief, Page 6: "As to the first objection, the transcript in fact shows that a motion was filed by the debtor himself for the fixing of **such rental** and was set for hearing by his own motion on August 13, 1940 (R. 8). Furthermore at the hearing on August 13, 1940, the debtor through his counsel, joined the creditors in asking that the rental be fixed. (R. 113)."

This can mean nothing else except respondents mean to say that the farmer debtor made a motion shown at R. 8 to have a motion made by him to fix **such rental** set for hearing on August 13. It is not true.

It is not without significance that the respondents refer to R. 8 (which is the entry of July 25, 1940) for the entry of that date, and then abandon further reference to the record at R. 9 and 10 where the events of August 13 were embodied in the entry of that date. For the events of August 13 they take us not to R. 9 and 10 but to R. 113 which is the conciliation commissioner's opinion (entered September 30, 1940, two months later) entitled, "Referee's Opinion and Decision on Petition for Rehearing of Orders of September 7, 1940."

We will therefore first look at the record at R. 8 (cited by respondents) and then at R. 9 which show:

> R. 8 July 25, 1940: "Motion by Debtor that appraisers be appointed, and his exemptions set off to him". . . . "Motion by debtor for hearing on exemptions and all other motions set for hearing August 13, 1940, at 10 o'clock a.m."
>
> R. 9. August 13, 1940: "Motion by" . . . [**three of respondents**] . . . "that the rent of the farm and personal property be set at the sum of $1625 for the first year; $2125 for the second year and $2625 for the third year" . . . [Total $6375] . . . "**In addition** debtor is to pay $1675 for the first year on the principal amount" . . . "$2125 for the second year" . . . "and $2625 the third year" . . . [Total $6375. Grand total $12,750.] . . . "**Hearing on motion; motion allowed** as per order (Dft). Objection by debtor, hearing thereon and objection overruled."

Instead of finding the farmer debtor moving that rental be fixed, he is recorded as objecting.

Turning now to R. 113 as cited by the respondents, we find the belated statement, made two months later on September 30, 1940, as to what occurred on August 13 and it contradicts the contemporaneous docket entry of August 13 as follows:

> R. 113: "At the hearing of August 13, 1940, the debtor through his Attorney Coulson, joined the creditors in a motion asking that a **reasonable rental** for the real and personal property be fixed." R. 113, paragraph 6, first sentence.

We have nothing but this two months *ex post facto* statement that the **farmer debtor** actually sought an order

to compel him to pay $12,750 in 2 years, 8 months and 13 days. We do have the contemporaneous entry of August 13, 1940, to show that it was the **respondents** who asked for exactly what was ordered.

Both the respondents and the conciliation commissioner silently elide over the order for **$6375 extra payments** made on August 13 in response to the **motions made by respondents on that day without notice.**

As to the **rental** amounting to an equal sum of $6375 **(total $12,750)** imposed the same day, it can not be said that it was in response to the farmer debtor's motion (which it is said he made) for a **"reasonable rental"**. Far from being a "reasonable rental," we would suggest that $6375 to be milked from 20 cows in 2 years, 8 months and 13 days is not **"rental"**—it can only be characterized as an **impossibility.** When it is considered that a grand total of $12,750 was ordered to be obtained out of the net returns of a 20 cow dairy farm in 2 years, 8 months and 13 days, it should be called an absurdity. When it is further considered that **twenty-five days later, on September 7, 1940, the cows, implements and feed were ordered sold as "perishable property"** words fail to characterize the proceeding.

We think such an order is a nullity—as void as an order upon the farmer debtor to pay the national debt.

2.

THE "SECOND OBJECTION".

Respondents' Brief Page 6: "As to the second objection, the amount of the rental fixed by the order, the record in fact shows that the rental as fixed was an amount less than the maximum figure suggested as rent and principal payments by the debtor through his counsel, Robert E. Coulson. (R. 159-162)".

Again when we look at the record at R. 159 to 162, cited by respondents, we read from the referee's opinion and decision entered November 28, 1940, which was more than five months after the events of August 13, that:

> "At the hearing on August 13, 1940, a hearing was held as to the fixing of the rental value for the property of said debtor and for the payment of principal due and owing by said debtor to the secured and unsecured creditors herein as their interests may appear, as provided by the provisions of 75-S of said Act; and at that time, after due hearing with reference thereto, counsel for said debtor, Robert E. Coulson, suggested then and there that the rental and principal payments be fixed between two designated amounts each year and that said rental, so fixed, was at a figure between the maximum and minimum so suggested by debtor's counsel. That said debtor was afforded and given full opportunity at such hearing to present evidence with reference to the rental value of said property; that at no time was he prevented from presenting such evidence; that said order of August 13, 1940, was duly presented to said Robert E. Coulson, attorney for said debtor; . . ." R. 159-160.

Now the original contemporaneous entries of the conciliation commissioner made in his docket on August 13, 1940, at R. 9, as indicated by the above quotations therefrom (Under reply to "The 'first objection'" page 4

of this reply brief), show that it was **respondents** who moved that rent of $6375 and extra payments of $6375, totaling $12,750 be fixed, and they were so ordered then and there. There is no contemporaneous or first hand entry or document anywhere in the record to show that the farmer debtor or anyone for him suggested either such a ridiculous rental or extra payments totaling $12,750.

Mr. Dazey's affidavit at R. 34 to 35 shows (1) that he (who had been retained as the farmer debtor's counsel) was incapacitated when these payments of $12,750 were ordered, not only throughout the month of August but in fact from May 21 up to the time of the affidavit filed September 19, 1940—with a stroke of apoplexy with blood pressure as high as 232 and at that time 192. His affidavit also shows (2) that Mr. Coulson was at no time authorized to take any steps in the case except to file papers. R. 34 to 35.

Mr. Coulson's affidavit at R. 94 shows the same, stating that he was employed by Attorney Dazey merely to file papers and that he at no time intended to represent said farmer debtor in any manner involving the law and did not do so. R. 94 to 95.

In addition to his affidavit at R. 94 the record also shows that Mr. Coulson verified the "Petition for Emergency Restraining Order" at R. 27 to 35 which was filed in the District Court on September 17, 1940. This petition alleges: (1) that the $6375 rental order and the extra payment order of $6375, total $12,750, was violative of Section 75 and void; (2) that it bears the written approval of three respondents and no other approval, **"was not presented to said farmer debtor or to his counsel, and was not approved by him or by his counsel"**; (3) that the farmer debtor at all times desired to present evidence on the subject of the order but had no opportunity to do so; (4) that

his evidence would show that said order was contrary to law; and (5) that he had on file his petition for rehearing.

In short the record is devoid of proof that the farmer debtor or his counsel suggested that he pay $12,750 out of his 20 cow dairy farm in 2 years, 8 months and 13 days.

3.

THE "THIRD OBJECTION."

Respondents' Brief Page 6: "As to the third objection to this order, the record in fact shows that the debtor in his own petition stated:

> 'That your petitioner's moratorium began running on, to-wit: the 26th day of April, A. D. 1941, and said first year of said moratorium will expire on, to-wit: the 26th day of April, A. D. 1941' (R. 68).

The Referee followed this suggestion in fixing the stay period, and the error, if any, was therefore induced by the farmer debtor himself and his counsel. They are in no position to criticize the referee in following their own suggestion."

The quotation from the record at R. 68 is correct. It is part of the "Petition of Farmer Debtor to Fix Rental" at R. 65 to 68. The author of this peculiar document is not indicated. We do know the following facts:

1. It was filed August 10, 1940, and on that date, and long before and thereafter, Mr. Dazey, the farmer debtor's counsel was incapacitated from a stroke of apoplexy with blood pressure as high as 232 and in September still at 192. Affidavit of Mr. Dazey, R. 34 to 35.

2. Mr. Coulson, employed by Mr. Dazey as local counsel, did not undertake to represent the farmer debtor in any

way except to file papers and he did not represent him in any substantive manner. Affidavit of Mr. Coulson, R. 94 to 95.

Mr. Coulson also verified the "Petition for Emergency Restraining Order" filed September 17, 1940. R. 27, to 34, his verification noted at top of R. 34. It contains the following allegations:

R. 29, paragraph 3: The order of August 13, 1940, in starting the stay period from April 26, 1940 is contrary to Section 75(s)(2).

R. 29 to 30, paragraph 4: The order of August 13, 1940, in fixing $6375 as rental to be paid within three years from April 26, 1940, that is within 2 years 8 months and 13 days from the date of the order, is contrary to Section 75(s)(2).

R. 30, paragraph 5: The order of August 13, 1940, fixed an additional sum of $6375 (a total with rental of $12,750) within the same period of 2 years 8 months and 13 days.

R. 30 to 31, paragraph 6: The order of August 13, 1940, bears the written approval of three of the respondents and no other. It was not presented to or approved by either the debtor or his counsel. The farmer debtor at all times during the pendency of the proceeding desired to present evidence on the subject of the order but had no opportunity to do so. The order is contrary to law in all respects.

3. An examination of the record discloses no reason why the stay and rental should date from April 26, 1940. No person with knowledge of the law and of the procedural facts would have picked that date. The record on this subject is here merely noted:

R. 2 and 3, Entries on district clerk's docket:

R. 3, April 25, 1940. Petition under Section 75(s) filed and approved.

R. 3, May 23, 1940. Notice and motion of Hook, (one of present respondents), filed. (As shown by later entries this was a motion to dismiss.)

R. 3, May 24, 1940. On call. No order—No order to vacate order of April 25.

R. 3, July 19, 1940. **Amendment to petition under 75(s) filed.**

R. 3, July 20, 1940. **Order of adjudication under Section 75(s) filed.**

R. 6 to 7, Entries on conciliation commissioner's docket:

R. 6, May 1, 1940. Memorandum of petition under Section 75(s) filed and approved.

R. 6, May 23, 1940. Debtor's inventory filed.

R. 6, May 31, 1940. Notice of first creditors' meeting.

R. 6, June 29, 1940. Written proposal by debtor to creditors' filed.

R. 7, June 29, 1940. First meeting of creditors. Farmer debtor sworn and examined. Motion by creditor (one of present respondents) to dismiss as to Section 75(a) to (r). Creditors reject proposal. Rule on farmer debtor to file "counter proposal". Motion by creditors for receiver.

R. 7, July 9, 1940. Second creditors' meeting. Motion to dismiss as to Section 75(a) to (r) allowed. "Debtor given fifteen days to file amended petition". Motion by creditors to appoint trustee.

R. 8, July 23, 1940. **"Amendment of petition under Section 75S filed by debtor." Order of adjudication under Section 75(s)** and reference to conciliation commissioner.

R. 8, July 25, 1940. Appraisers appointed.

R. 8, July 31, 1940. Appraisers' report filed.

R. 8, August 2, 1940. Conciliation Commissioner's report of exemptions.

R. 10, August 13, 1940. **Orders approving appraisal and fixing exemptions.**

Now Section 75(s)(2) clearly prescribes that the stay and rental order may not issue until after the appraisal

is made and exemptions set aside. These were done on August 13, 1940. R. 10, conciliation commissioner's entry of August 13, 1940. It "may start to run only after such appraisal has been made." *Wright* v. *Union Central*, 311 U. S. 273 at 275, citing *John Hancock* v. *Bartels*, 308 U. S. 180 (186), and *Borchard* v. *California*, 310 U. S. 311 (317).

And further, Section 75(q) lays upon the officiating conciliation commissioner a mandate to be active in protecting the statutory rights of the farmer debtor. It says:

> "**A conciliation commissioner shall** upon request **assist any farmer** in preparing and filing a petition under this section and **in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding in this section.**"

The referee was not warranted in following the "suggestion" in fixing the stay period. The duty of the conciliation commissioner is prescribed by the statute and no "suggestion" may amend that statute, especially when the farmer debtor's proceeding was not only rudderless but without a captain.

Respondents' Brief Pages 6 to 7.

Under Heading: "Orders of September 7th (CCA No. 7631)". (These are the orders ordering sold as "perishable" the cows, implements and feed of the farmer debtor, R. 77 to 88.)

1.

Respondents' Brief Page 6: "The orders [they mean the three **motions** which were granted by the orders of September 7] of September 7th came on for hearing, pursuant to notice and order of court **on debtor's own motion, on August 13, 1940.**"

This statement is ambiguous. Whatever it means, the record does not support it. It may be intended to mean:

(1) Either that the orders of September 7 (that is, the motions which were granted by the orders of September 7), came on for hearing on August 13,

(2) Or that they came on for hearing pursuant to the farmer debtor's motion made on August 13,

(3) Or that the farmer debtor made a motion which resulted in the orders of September 7.

The statement is false as to any of these meanings because:

1. The orders of September 7 (that is the motions granted by the orders of September 7) did not come on for hearing until September 7 when the motions of respondents were heard, and granted. They were not filed until August 7 to August 10 (R. 8 to R. 9) and on August 13 were set for hearing on August 30 continued to September 7. See R. 10, last sentence of entry of August 13 which continues over from R. 9. R. 10, entry of August 30.

2. The farmer debtor made no motion on August 13, nor at any other time, to have his chattels sold as "perishable". Respondents on July 25 were granted leave "to file petitions for reclamation and/or sale of personal property by August 10, 1940, under Sub Sec. S, paragraph 2". R. 8, last half of entry of July 25, 1940. Four such motions were filed on August 7, 8, and 10. Bottom of R. 8 and top of R. 9. Hearings were set for August 30. R. 10, end of entry of August 13 which continues over from R. 9. On August 30 they were continued to September 7. R. 10, entry of August 30. On September 7 they were heard and allowed. R. 10, entry of September 7. The only applications made by the farmer debtor prior to September 7 were: (1) His motion for appraisal and exemptions. R. 8, first entry of July 25. (2) His petition for a rental order. R. 9, second entry of August 10.

3. The orders of September 7 were issued upon the motions of respondents filed on August 7, 8 and 10, and upon no other, as shown under the immediately foregoing subparagraphs 1 and 2.

2.

Respondents brief bottom of page 6, continuing to top of page 7: "On this day [August 13] the Three Creditors offered witnesses to prove that the personal property in question was perishable within the meaning of the Act. After such witnesses were sworn, but before the evidence was given by them, debtor's counsel stated that such testimony was not necessary (R. 111). [In the record at R. 111 it is said that the date of this occurrence was "August 13, 1949".] Thereupon said witnesses were withdrawn and the following stipulation was made of record:

'Hearing on Reclamation Petition and stipulations by the debtor and each of the following claimants: Hartman and Son, Northern Illinois Finance Company, and Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of paragraph 2 sub-section (s) of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by the debtor as exempted property' (R. 10.)"

The hearing on August 13 was not called to hear the respondents' motions to reclaim their security. There was no occasion to present evidence in relation to these motions; they were not at issue and had not been set down for hearing. The first, that of respondent Hartman, was filed on August 7, and the last, that of respondent Northern Illinois, was filed on August 10. The hearing on August 13 had been set on July 25, thirteen days before the first motion

was filed and sixteen days before the last one was filed. The subjects of the August 13th hearing were the appraisal, exemptions, and rental. See R. 10, two entries of August 13. Pursuant to Section 75(s)(2), the conciliation commissioner proceeded to issue a stay order and fix rental. See R. 9, entry of August 13. And for the stay order see the last paragraph at R. 76.

In addition to the announced purpose of the called creditors' meeting on August 13, the creditors on that day brought up the subject of their pending petitions for the reclamation of their security (cows, farm implements, and crops) out of Section 75(s). The record contains the following entry from the conciliation commissioner's docket:

> R. 10, top of page, August 13, 1940: "Hearing on Reclamation petition and stipulations by the debtor[1] and each of the following claimants: Hartman and Son, Northern Illinois Finance Company and the Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of paragraph No. 2, Sub-Sec. S. of Sec. 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by debtor as exempted property."

The scene in the conciliation commissioner's office on August 13th may be reconstructed with some confidence. Counsel for respondents were present. R. 9, entry of August 13. R. 16, affidavit of said counsel. Mr. Coulson was present. See bottom of R. 159. The farmer debtor was not present. He attended the creditors' meeting on June 29 (R. 7, top of page) and that on September 7 (R. 37, bottom half of page). R. 114 "Opinion and Decision"

[1]The farmer debtor was not present. See the text of this reply brief which follows this quotation from R. 10.

of Conciliation Commissioner: "Of all the various meetings held in this cause, debtor attended only two."[2] The attorneys for the creditors ask Mr. Coulson whether the cows are not perishable and he says: **"If they meant to ask him whether the cows would die, he would answer yes."** Mr. Coulson's affidavit on this point is:

> "he at no time intended to represent said farmer debtor in any manner involving the substantive law and that in particular he did not stipulate or agree that any cows in the estate of said farmer debtor were perishable; that when present in the office of said conciliation Commissioner with attorneys for certain creditors, he was asked whether he would admit that the cows in said estate were perishable and he answered that if they meant to ask him whether the cows would die he would answer yes." R. 94 at 95.

The conciliation commissioner's version, some seven weeks afterward, of the alleged "stipulation" is as follows:

> R. 111, Referee's Opinion entered September 30, 1940:
>
> "At the hearing of September 7, 1940, the following persons were present: . . . [Names of counsel] . . .
>
> Prior to that date, [that is on August 13], the Algonquin State Bank, Northern Illinois Finance Corporation and Hartman & Son (hereinafter called the Three Creditors), offered witnesses to prove that cattle of the ages covered by their conditional sales contracts and chattel mortgages were perishable within the meaning of the Act. After the witnesses were sworn but before any evidence was given by them, debtor's counsel stated that such testimony was not necessary, that he would stipulate that the security of said Three Creditors were perishable within the

[2] The nonattendance of the farmer debtor at these meetings is further evidence of his proceeding floundering in stormy seas without captain or rudder, sans even a sea anchor.

meaning of the Act. This oral stipulation was entered on the Commissioner's docket under date of August 13, 1940."

To recapitulate. A called creditors' meeting was held on August 13 to settle the appraisal, set off exemptions, stay proceedings and fix rental. There were then pending four motions to reclaim the farmer debtor's chattels as "perishable", the last one having been filed three days previously. **These motions were not at issue; they had not been set down for hearing.** Mr. Coulson was asked by respondents' counsel: "Robert, don't you admit that cows are perishable?" He answers: "Well, if you mean will they die, I would answer yes." But the creditors and the conciliation commissioner aver that on this August 13th the creditors had their witnesses present and sworn but not used because Mr. Coulson said he would admit "the security of said Three Creditors was perishable within the meaning of the Act" (That is cows, implements, crops under Section 75(s)(2)).

If there be any immutable principle of Anglo-American jurisprudence it is that every man is entitled to have his day in court. The motions were not at issue on August 13; there was no notice that their subject matter would then be considered; the farmer debtor was not present; Mr. Coulson was not authorized; and there was no stipulation—merely banter between counsel. The time and place for proffered witnesses and testimony was at the time and place later set for hearing of the motions—namely before the conciliation commissioner on September 7, 1940. See the reference to Remington in petitioner's brief at pages 64 and 65. Also the decisions in the cases of *Rosser*, *Boyd* v. *Glucklich*, *Frank*, and *Galpin* v. *Page*, cited at page 65 of petitioner's Brief and discussed in his Supplemental Brief at No. 44, page 35; No. 9 at page 8; No. 19 at page 17 and No. 20 at page 18.

Respondents' Brief Page 8

Under Heading "Debtor's and Attorneys' Appearances before Referee."

1.

THE INCAPACITY OF COUNSEL.

During all of the times the proceeding was pending before the conciliation commissioner under Section 75(s) the farmer debtor's counsel, Mr. Dazey, was incapacitated. No other counsel was authorized to represent him. It was not until September 7 at the earliest that Mr. Dazey realized what was going on, and when he did he took measures to have the whole situation examined into. How respondents would think that an incapacitated man could protect his client's rights is not clear. At any rate they still claim the advantages they gained thereby. Under this unfortunate circumstance, evidently the respondents proceeded to "make hay while the sun shines". Upon a 20 cow dairy farm they got—upon their specific motions made and granted the same day without notice—a total of $12,750 rental and extra payments, ostensibly by authority of Section 75(s)(2), to be paid within 2 years, 8 months and 13 days. Then after a 25 day breathing spell they obtained authority from the conciliation commissioner to sell, as "perishable" the farmer debtor's cows, farm implements and crops. As soon as Mr. Dazey learned of the floundering proceeding it was halted. Authority for the foregoing statements. R. 34 to 35. R. 94 to 95. R. 30, paragraphs 6, 8, 10, Note of verification by Mr. Coulson at R. 34. R. 9, entry of August 13. R. 72 to 76. R. 10, entry of September 7. R. 77 to 88. R. 146 to 147, paragraph 15.

Although the farmer debtor was without counsel, he should not have been without representation for 75(q) made it the sworn duty of the conciliation commissioner to protect the rights of the farmer debtor by assisting him. The conciliation commissioner seems to have administered the farmer debtor proceeding strictly as a **referee in bankruptcy** where the creditors control the proceeding and not under the farmer debtor statute which makes the conciliation commissioner the guardian of the rights of the farmer debtor under it.

Fortunately the creditors overreached their advantages and secured their orders without that due process of law which is necessary to make them valid.

2.

IMPUTING THE RESULTS OF COUNSEL'S INCAPACITY TO CLIENT.

Imputing the inactivity of his incapacitated counsel to the farmer debtor, the respondents say, at the middle of page 8 of their brief, that he "took no real interest in the proceedings, and his petitions for rehearing were not filed in good faith but 'merely for the purpose of reviving and extending the time for filing a petition for review.'"

It is difficult to conceive how respondents can seriously intend such a statement to be believed in the face of the record. We refer again to the evidence submitted in the brief for the petitioner under heading 3 at pages 49 to 56. It would seem to be quite apparent that he was seeking, and still seeks, the application of the "orderly procedure" prescribed by the "mandate of the statute" in Section 75 which the statute and the decisions of this court have re-

peatedly declared to be his right. Had he known, on September 17, 1940, when he filed his "Petition for Emergency Restraining Order" R. 27 to 34, that an order, or orders, of September 7 had already been entered, he would not, on the tenth day have prayed the District Court to restrain the conciliation commissioner from holding a sale before an order was entered.

3.

WHEN WERE THE ORDERS OF "SEPTEMBER" ENTERED?

Respondents' Brief, bottom of page 8: The respondents say: "Throughout petitioner's **petition** [brief], **his counsel has taken the liberty of misrepresenting statements of fact which are not borne out by the record.** For example, at pages 33, 35, and 53 of his brief, filed in this court, appear self-serving statements intended to give the impression that the orders of September 7th were not actually entered at such a time. **No references to the record bearing out these statements are made.**"

The challenge is accepted and we appeal to the record. We will trace these three orders of September 7, 1940 until they appear in their fully developed form at R. 77 to 88. We find them first in embryo.

1. R. 90, paragraph 3. Counsel for the petitioner here repeats the substance of the statement under the heading "Sixth" at page 53 of petitioner's brief and says that on September 12, 1940 (five days after the purported orders of September 7 were later said to have been entered) he

(1) went to the office of the conciliation commissioner, (2) asked for the conciliation commissioner's docket and file in this cause, (3) copied every entry in the cause, (4) examined and made notes of or copied every paper in the file, "taking each paper separately therefrom and carefully reading it," (5) but there was then in the file no order of September 7, 1940, for the sale of the petitioner's chattels, and (6) there was nothing on the docket pertaining to such an order except the entry of September 7 (which is copied in part in the next paragraph, and which appears in full at R. 10).

2. R. 32. At the top of R. 32 in the "Petition for Emergency Restraining Order" filed September 17, 1940, the conciliation commissioner's docket entry of September 7, 1940, relating to the allowance of the respondents' petitions to reclaim (now referred to as petitions to "sell") the chattels as "perishable" is copied in full. That entry concludes in these words: "prayer of petitions granted as per order (Dft)". Paragraph 8, R. 32 of the same "Petition for Emergency Restraining Order" recites that no order pursuant to the memorandum entry of September 7 had yet been issued or entered. Paragraph 9, R. 32, recites that the farmer debtor was informed and believed an order of sale was about to be issued. He had already filed a petition for rehearing of the order of August 13. (See R. 139). In paragraph 11 (R. 33), he averred that as soon as an order of sale was issued he desired to obtain a rehearing or to file a petition for review thereof. In paragraph 12 (R. 33) he averred that it was necessary to restrain a sale until an order should first have been entered.

Mr. Coulson verified the statements made in this "Petition for Emergency Restraining Order". R. 34, top of

page. Mr. U. G. Ward, an attorney, was present on September 7 at the hearing before the conciliation commissioner and says that an order was **to be prepared**. (R. 108.

3. R. 10, entry of September 7. As just remarked, the memorandum on the conciliation commissioner's docket dated September 7, 1940, concludes as follows: . . . "prayer of petitions granted as per order (Dft)". The interpretation of the parenthetical letters "(Dft)" is left to the reader. The respondents have not ventured to explain it. The original, and present, interpretation of counsel for the petitioner is that "(Dft)" is an abbreviation for "Draft" which in turn means "Let an order be drafted accordingly."

4. R. 35 to 40. At the hearing of the "Petition for Emergency Restraining Order" on September 19. (R. 3, last entry of September 19) respondents presented their "Answer" which is pregnant with important negative evidence.

In paragraph 8 (R. 38) of their answer they "aver that orders **have** been entered" on September 7. They do not clearly and unequivocably say **"were"** entered on September 7.

In paragraph 10 (R. 38 and 39) they say that "on the 13th day of **September** [August] AD 1940" they appeared with witnesses but Mr. Coulson waived proof and stipulated that the cattle were "perishable" under Section 75. They continue to say (which is important as will appear below): "Said commissioner so found **as will appear by his findings more fully set forth in his orders thereon, a copy of one of which is hereto attached and marked 'Ex-**

hibit B' ''. Now this "Exhibit B" appears in full at R. 40 and **it in no way recites any such "findings" by the conciliation commissioner.** It merely appoints an officer and directs him to sell on September 30, 1940. But when we go to the full fledged order we find that, R. 79 and R. 87 to 88, he orders the sale to be at a "date and hour to be selected by said officer" with "at least five days' prior" notice; while at R. 81 the sale is to be on "fifteen (15) days' notice".

In paragraph 11 (R. 39) of their "Answer" they say that "said **order** is entered **as of**" September 7. And at R. 97 to 105, as late as September 26, we find **the same respondents** (bottom of R. 39, bottom of R. 105) referring **five separate times to** "the **order**" or "said **order**" (R. 100 and 101, paragraphs 3 and 4. R. 103, paragraph 11). They still shy away from a flat statement that three orders were **entered on September 7** for we find them saying "said **order** prior to the time **same was** entered" and "**at the time of the signing** and entry thereof." R. 103, paragraph 11.

It appears significant that on September 19, before the District Court, and later on September 26, before the conciliation commissioner, the respondents would not categorically state that on September 7 three separate orders were entered and that they did not then and there produce the three orders but referred to a single **order** and produced something quite different—their "Exhibit B" appointing an officer to **conduct** a sale. The **three orders** when they appear in the record at R. 77 to 80; R. 80 to 82; and 82 to 88, were something else.

5. R. 88 to 97. All of the foregoing assumed additional significance when the farmer debtor's petition for rehear-

ing of the orders of September 7, filed September 20, is examined. In paragraph 4, R. 90, it is stated that on September 19 (at the hearing in the District Court, R. 3, last entry of September 19), the farmer debtor first learned what he had not theretofore known, namely that three orders were involved. But even then he did not see them and it was necessary to file on September 23 an amendment (R. 95) to his petition for rehearing in which at paragraph 10 he referred to paragraph 4 (R. 90) of the petition for rehearing and said that he did not see said "orders" until "one of them" was **shown to the court** and not until then did he know "**its contents.**" R. 96. As we know this must have been the interesting "Exhibit B" at R. 40, which turned out to be something different from the **THREE ORDERS** appearing in the record at R. 77 to 88.

6. Section 75(a) makes the conciliation commissioner a referee. Section 1(9) makes the referee the court. Rules of Civil Procedure, Rule 77, makes it the duty of the court immediately upon the entry of an order to serve notice and note the service on the docket. This was not done.

So right up to September 26 we find all parties referring to "an **order**" and that order was "**Exhibit B**" **at R. 40.**

It would seem pertinent to ask: Why were the three orders not produced on September 19 if they had been entered? Why was a different order produced as Exhibit B (R. 40) on September 19 if three other and different orders were entered on September 7? Why was the reference always to **an order** up to September 26. When the farmer debtor's pleadings repeatedly referred to an **order**

why did the respondents not say "There was not one but three orders and here they are and were entered on September 7"?

The conclusion of the whole matter is that it can not be said, as respondents assert at the bottom of page 8 of their brief that "the record emphatically shows that these orders were entered and signed by the referee on the date of their entry in the presence of the farmer debtor." The record leaves it very doubtful, to state it lightly, whether the three orders of September 7 were entered on that date.

REPLY TO THE "ARGUMENT" OF THE RESPONDENTS.

(Respondents' Brief, beginning at page 9)

Respondents' Brief Pages 9 and 10: The assertion at the bottom of page 10 that the questions presented are not before this court. (See Petition, pages 10 to 25: "The Question Presented" and "Reasons Relied upon". Also Brief, pages 37 to 40: "Specification of Errors".)

All of the questions presented were comprehended in the Statement of Points submitted in the Designation in the appellate court (R. 188 to 191) in compliance with the rule of that court, and in that court's opinion (R. 209 to 215). They were fully argued in the appellant's brief, the appellees' brief and the appellant's reply brief in the appellate court. They were all considered in the opinion of the appelate court (R. 209 to 215). The petitioner's "Specifications of Errors" was compiled from the Statement of Points submitted below and from the opinion of that court.

Respondents' Brief Pages 11 to 14: The respondents here proceed to argue the merits of the decision of the appellate court.

It is conceived that this is not the time or place to argue whether the merits lie with the decision of the appellate court below. The reasons for the allowance of the writ have been respectfully submitted and the merits will be be argued when the writ is granted. Therefore no reply is now offered to the respondents' arguments on the merits.

The petitioner's Petition for Certiorari, at pages 14 to 25, submits the reasons why a writ of certiorari should be granted. Among them are enumerated certain statutory provisions which have not been interpreted by this court. On certain of them the interpretation of the appellate court below is in conflict with that of other circuit court of appeals. Certain other questions of law are enumerated on which the decision below is in conflict with other circuits. On some of both points the decision of the appellate court below is contrary to one or more decisions of this court.

There is noted below a new decision of an additional circuit with which the decision below is in conflict, in the interpretation of Section 39(c).

NOTE

New Circuit Decision

On this subject the petitioner here respectfully brings to the attention of this court a newly announced decision

of another Circuit Court of Appeals with which the decision of the appellate court below is in conflict. It is:

Biggs v. *Mays*, (CCA 8), decided February 16 1942, and digested at paragraph 33650 of the Bankruptcy Law Service, published by the Commerce Clearing House.

It holds that Section 39(c) of the Bankruptcy Act is not a condition upon the jurisdiction of the court and in no way limits the power of the court, being merely procedural.

This makes a total of four circuits with which the decision below is in conflict, namely the Second, Third, Sixth and Eighth. See Petition for Certiorari, pages 18 to 19, category 9.

CASES CITED BY RESPONDENTS

Respondents' Brief Pages 14 to 35.

The respondents make no mention of certain citations and authorities presented by the petitioner. It is therefore presumed that they are not questioned. We do not take seriously the suggestion that they are not germaine or that the petitioner's brief does not correctly cite or apply them.

We will therefore proceed to discuss the cases noticed by the respondents.

Respondents' Brief Page 14.

Benitez v. *Bank*, 1941, 313 U. S. 270.

This decision is discussed in the petitioner's supplemental brief, at page 5, number 5. This court said in its opinion at page 272: "The meaning of the phrase 'for the purposes of **this section**' is hardly open to question". The words "this section" in the first paragraph of Section 75(s) applying to all objections, exceptions and appeals under Section 75 are qualified in no way. They occur twenty-six times in Section 75.

In re David, CCA 3, 1929, 33 Fed. (2d) 748.

This decision does not relate to the statutory provision of Section 39(c) of the Bankruptcy Act which did not then exist. It relates to a petition for a writ of certiorari which the appellate court denied. The Third Circuit is in accord with the general rule that a rule of court limiting time within which to file a petition for review is not jurisdictional. In fact its later decision in *Roberts Auto Supply* v. *Dattle*, CCA 3, 44 Fed. (2d) 159, discussed in the paragraph immediately following is sometimes cited as a leading case on the subject.

The Third Circuit is, in principle, another circuit with which the decision below conflicts—although its decisions so far reported have been on the former rule of court and not on Section 39(c) which incorporates the rule.

Respondents' Brief Page 15.

Miller v. *Hatfield*, CCA 6, 1940, 111 Fed. (2d) 28 at 34.

Several questions were involved in this decision. As will be seen by turning to the last two paragraphs of the

decision at page 34, **no petition for review was ever filed** on the question there discussed. And as will also be seen by reading the eighth and ninth whole paragraphs of the decision on page 32 (the second and third from the bottom of the page), this Sixth Circuit Decision expressly mentions Section 39(c) and says of the former rules of court (now embodied in the statute) that "the courts entertained petitions for review which had not been filed until after the expiration of the arbitrary period," **citing the Third Circuit decision** of *Roberts Auto Supply* v. *Dattle*, CCA 3, 44 Fed. (2d) 159, (referred to in the preceding paragraph). The opinion goes on, in the paragraph continuing over on page 33, to hold that even the conciliation commissioner was not bound by the ten days court rule and cites in support the Second Circuit decision of *In re Pottasch*, CCA 2, 1935, 79 Fed. (2d) 613. The *Pottasch* decision is included in the petition at page 24 and in petitioner's Supplemental Brief at page 32, No. 40. (A later decision of the Second Circuit, *In re Albert, Brooklyn* v. *Albert*, CCA 2, 1941, 122 Fed. (2d) 393, was cited at page 19 of the petition herein as being one of the decisions with which the decision below is in conflict.)

Both the Second and Sixth Circuits are named in the petition as being circuits with whose decisions the decision below is in conflict. See the petition at page 19 and at page 21.

Respondents' Brief Page 16.

Respondents on this page cite thirteen decisions, four of which they do not discuss. The other nine are not discussed in the order of appearance in this list. We will discuss all of them. The four which are not discussed by respondents will be discussed here. The other nine will be discussed in the order in which respondents discuss them.

DISCUSSION OF CASES CITED BUT NOT DISCUSSED BY RESPONDENTS.

Respondents' Brief Page 16: The Four Undiscussed Decisions Which Respondents Cite.

Mintz v. *Lester*, CCA 10, 1938, 95 Fed. (2d) 590, cited but not discussed, respondents' brief, page 16, case number 8. This decision accords with the universal rule that the denial of an application for rehearing is discretionary and not appealable. Appellant Mintz appealed from an order "denying her motion for a rehearing". The motion for rehearing was denied May 20; the appeal was from that order and no other. The last sentence of the opinion is: "It follows that the appeal was improvidently granted and it is therefore dismissed. The distinction was clearly and concisely worded in *In re Jayrose*, CCA 2, 1937, 93 Fed. 471, quoted in supplemental brief, number 28 at pages 22 and 23, and cited in the petition at page 21 as one of the Circuit decisions with which the decision below is in conflict.

International v. *Cary*, CCA 6, 1917, 240 Fed. 101, cited but not discussed, respondents' brief, page 16, case number 9. This Sixth Circuit decision is sandwiched between its prior decision in *West* v. *McLaughlin*, CCA 6, 1908, 162 Fed. 124, 125, and its later decision in *Miller* v. *Hatfield*, CCA 6, 1940, 111 Fed. (2d) 28 at 32, both holding that a petition for review may be filed after the period fixed by rule of court. This decision was distinguished by the Sixth Circuit in *Miller* v. *Hatfield* at page 33, saying "This conclusion is not in conflict with *International Agr. Corp.* v. *Cary*, *supra*." This is true because the original order had already been considered on a petition for review and re-

versed. Two years later another petition for review was filed and dismissed.

In re Albert; Brooklyn v. *Albert*, CCA 2, 1941, 122 Fed. (2d) 393, cited but not discussed, respondents' brief, page 16, No. 11. This is one of the decisions cited as showing that the decision below is in conflict with that of other circuits. Petition page 19 "In the Second Circuit", it holds that Section 39 is not a statute of limitation, and does not limit Section 2 (10) and also that "The jurisdiction of the bankruptcy court when invoked by the filing of the petition continues until the estate is closed". It upholds the contention of the petition for certiorari.

In re Wister, CCA 3, 1916, 237 Fed. 793, cited but not discussed, respondents' brief, page 16, case number 13 (undiscussed by respondents). As already shown (at page 27 of this reply brief) the Third Circuit is in the majority in holding that a petition for rehearing may be filed after a rule-fixed time for filing. This Wister decision does not depart from its earlier and later decisions. The facts of the case set it apart. Creditor W filed a petition for review and eight months later joined with the trustee "praying that the proceedings be dismissed and the order of the referee be affirmed". Creditor S then filed an application to intervene, praying that W's petition for review be not dismissed and that he be allowed to intervene as if he had filed a petition for review. That is S never filed any petition for review. The application was denied.

This completes the cases cited at page 16 of respondents' brief and not discussed. They are in accord

with the rules that (1) a district court has jurisdiction to hear a petition for review filed after the time limited therefor and (2) a petition for rehearing filed after time for appeal when entertained obliterates the finality of an order.

DISCUSSION OF CASES CITED AND DISCUSSED BY RESPONDENTS.

Respondents' Brief Page 16.

Conboy v. *First National Bank*, 1906, 203 U. S. 141. Case Number 1, cited at page 16 and discussed at pages 16 to 19 of respondents' brief. This case involved a question of substantive bankruptcy law.

The decision has been thoroughly analyzed in petitioner's Supplemental Brief, page 13, number 16. Four observations are pertinent to respondents' claims concerning it.

(1) Its internal structure is weak and lacks consistency. Five out of eight cases are inconsistent with the statement it makes concerning them. Reference is especially made to the portion of the decision quoted by respondents' Brief in the middle of page 13. See Supplemental Brief, lower half of page 13 and page 14, where this subject is analyzed.

(2) We are not concerned with an appeal from a denial of a petition for rehearing, but with an appeal from the original order.

(3) This court in *Wayne* v. *Owens-Illinois*, 1937 300 U. S. 131, 133, especially cited it in Note 2, as being indecisive and adhered to the two decisive decisions of (1) *West* v. *McLaughlin*, CCA 6, 1908, (discussed in the Sup-

plemental Brief at page 52, number 64, and (2) *Cameron* v. *National*, CCA 8, 1921, 272 Fed. 874 (discussed in the supplemental brief at pages 10, number 11.)

(4) The *Conboy* decision is 36 years old and **this court has cited it only four times in cases heard by it and has never followed it.**

The **first time** the *Conboy* decision was cited: *Harrison* v. *Magoon*, 1907, 205 U. S. 501. The *Conboy* case grew out of bankruptcy. This *Harrison* case involved (1) a judgment of a Hawaiian territorial court and (2) the applicability of an Act relating to appeals from that territory which was enacted after the original judgment was rendered. The opinion at page 503 remarked: "No doubt the decisions cited and others show that **where a right to take the case up exists at the time of the original judgment, the time limited for the writ of error or appeal does not begin to run until the petition for rehearing is disposed of.**" It was held that the territorial judgment act not being existent when the original judgment was rendered a petition for rehearing could not make such a subsequent act applicable. In passing the opinion observed that the general rule had been limited as to bankruptcy cases by the *Conboy* decision. This court expressly made it apply to bankruptcy law in *Wayne* v. *Owens-Illinois*, 300 U. S. 131. See Supplemental brief, page 46, case number 62.

The **second time** the *Conboy* decision was cited: *Old Nick* v. *U. S.*, 1910, 215 U. S. 541. Verdict and judgment in federal court for violation of alcohol tax, motion to vacate and for new trial overruled. Writ of error not issued within six months as required by statute, whereupon the court entered an order reciting that a writ of error was "issued and served *nunc pro tunc* as within" the statutory

six months. This court held that a mere *nunc pro tunc* order did not cure non-compliance. Again the opinion remarked, *obiter dicta*, that in bankruptcy a petition for rehearing filed after time for appeal did not save the appeal which was held otherwise in *Wayne* v. *Owens-Illinois*, as stated above.

The **third time** the *Conboy* decision was cited: *Zimmern* v. *U. S.*, 1936, 298 U. S. 167. Suit to set aside deed and to make real estate subject to income tax. The judgment court extended the term to allow time for modifying its judgment. This court held that the court had control over its judgment within the extended term and reversed the appellate court for dismissing the appeal. The opinion merely remarked, as an aside, that a petition for rehearing was filed "when the time for appeal had already gone by if the original decision was then presently in force. *Cf. Conboy* v. *First Nat. Bank*, 203 U. S. 141, 145."

The **fourth time** the *Conboy* decision was cited: *Wayne* v. *Owens-Illinois*, 300 U. S. 131, 133, note 2: "This court had averted to the question without deciding it," (citing the *Conboy* decision), and then proceeded to "decide it" adversely to *Conboy*.

It is of importance to note that in contrast to the *Conboy* decision of thirty-six years ago which has never been followed by this court in any case heard by it, the *Wayne* v. *Owens-Illinois* decision decided five years ago has been followed without question by the lower federal courts. The latest issue of Shepard's Citations contains 43 lower federal court references to it.

Respondents' Brief Page 19.

Chapman v. *Federal*, CCA 6, 1941, 117 Fed. (2d) 321. Case Number 3 in the list cited at page 16 and discussed at page 19 of respondents' brief.

It is evident that the author of respondents' brief has misread the facts in this case so they will be related. The farmer debtor died leaving as heirs her two sons and her surviving spouse, their father, who was appointed administrator. The constitutionality of the provision of Section 75(r) that the term "farmer" . . . "includes the personal representative of a deceased farmer" has not been determined by this court. Consequently two farmer debtor petitions were contemporaneously filed, one by the administrator, and another by the heirs, the administrator being himself the sole petitioner in one case and joining individually with his two sons in the other. Creditors attacked both petitions for "lack of good faith" and "impossibility of rehabilitation" and the District Court dismissed both cases.

As the constitutionality of the provision of Section 75(r) giving the administrator the right to file as a farmer debtor had not been attacked in the district court that subject was deemed waived and only the dismissal of the administrator's proceeding was appealed. After the appeal was briefed by the appellant this court decided *John Hancock* v. *Bartels*, 308 U. S. 180, holding that farmer debtor proceedings may not be dismissed for "lack of good faith" or "impossibility of rehabilitation" thus leaving the dismissal by the District Court without a leg to stand on. The appellee obtained an extension of time to plead and, abandoning every argument previously advanced, attacked the appeal upon the sole ground that a farmer debtor proceed-

ing by an administrator is unconstitutional and moved for dismissal of the appeal.

The appellant countered by obtaining leave to go back into the district court to file a petition for rehearing upon the basis of the *Bartels* decision. In the district court petitions for rehearing were then filed in both cases. Both were denied whereupon the heirs' case was also appealed making two pending appeals which were consolidated.

The appellate court held the administrator's proceeding was rightly brought under Section 75(r), thus leaving the heirs' case of no moment whatever except as an encumbrance on the docket. The opinion was that of a new judge just appointed. One judge died prior to the decision and did not participate in it. The third judge took occasion to "concur in the opinion". The opinion as to the heirs' proceeding relied upon *Mintz* v. *Lester*, CCA 10, 1938, 95 Fed. (2d) 590, (discussed at page 29 of this reply brief) where the appeal was from the dismissal of a **petition for rehearing**, and other similar weak appellate decisions. It quoted (at page 324) from *Conboy* v. *First National Bank* (1906), 203 U. S. 141, as follows. Page 324: "No appeal lies from orders denying petitions for rehearing". It held that the heirs' petition for rehearing was not "seasonably" filed (having been filed after seven months).

The petitions for rehearing in this pending *Pfister* case were filed within two weeks and five weeks respectively, both being filed shortly after counsel discovered what had occurred. R. 9, entry of August 13. R. 10 entries of September 7 and 16. R. 11 entry of September 20. R. 27 to 34. R. 34 to 35. R. 89 and 90, paragraphs 2 and 3. R. 144, paragraphs 7, 8 and 9. R. 146, bottom of page and top of R. 147.

The significance of *Chapman* v. *Federal*, CCA 6, 1941, 117 Fed. (2d) 321, is the following quotation from it: "But **where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the appeal runs from the date thereof**" citing *Wayne* v. *Owens-Illinois*, 300 U. S. 131; *Voorhees* v. *John T. Noye*, 151 U. S. 131; *Gypsy* v. *Escoe*, 275 U. S. 498. Thus putting the Chapman heirs' decision solely on its interpretation of "seasonable" and "entertain" and "consideration on the merits". In this pending *Pfister* case the conciliation commissioner himself denied motions to dismiss the petitions for rehearing and therefore "entertained" them and reported that he fully considered the "entire proceeding". See petitioner's brief, page 36, "Petitions for Rehearing and Their Denial."

The Chapman opinion lends no aid to the respondents' argument. The facts and the procedure differ widely from the present pending case.

Respondents' Brief Page 19.

C. M. and St. P. R. R. Co. v. *Leverentz*, CCA 8, 1927, 19 Fed. (2d) 915. Case Number 2 as cited at page 16 and discussed at page 21 of Respondents' Brief.

Respondents' Brief Page 25.

McIntosh v. *United States*, CCA 4, 1934, 70 Fed. (2d) 507. Case Number 4 in the list cited at page 16 and discussed at page 25 of respondents' brief.

Respondents' Brief Page 26.

Northwestern v. *Pfeifer*, CCA 8, 1929, 36 Fed. (2d) 5. Case Number 6 in the list cited at page 16 and discussed at page 26 of respondents' brief.

Respondents' Brief Page 26.

Larkin v. Hinderliter, CCA 10, 1932, 60 Fed. (2d) 491. Case Number 7 as cited at page 16 and merely cited as "In accord" at page 26 of respondents' brief.

These four cases will be discussed in one group.

They were not bankruptcy cases but civil suits. In the first three cases time for filing error was three months. In each of these three cases a motion for new trial was filed within term but after three months and denied. Consequently each writ of error or appeal was taken more than three months thereafter.

The court in each of the three decisions held that if an application for a new trial or for rehearing is not filed within the period for seeking a review, it is lost. This was expressly disapproved and repudiated by this court in *Wayne* v. *Owens-Illinois*, 1936, 300 U. S. 131, at 137, saying "courts of law and equity have such power, limited by the expiration of the term at which the judgment or decision was entered and not by the period allowed for appeal, or by the fact that an appeal has been perfected," citing in Notes 9 and 8 some of the decisions of this court already relied upon by the petitioner. This decision, when rendered was with the minority, and is utterly repudiated.

The fourth case, *Larken* v. *Hinderliter*, CCA 10, 1932, 60 Fed. (2d) 491, was slightly different but sympathetic with the other three. Appeal time was thirty days and the court held that an informal application for a slight correction of a judgment was not an application for rehearing.

Respondents' Brief Page 25.

Clarke v. *Hot Springs*, CCA 10, 1935, 76 Fed. (2d) 918. Case Number 5 in the list cited at page 16 and discussed at page 25 of respondents' brief.

This is an obiter dicta opinion that a petition for rehearing to be seasonable must be filed "within the time for appeal". This court held in *Wayne* v. *Owens-Illinois*, 300 U. S. 131, 137 that the power of a court to entertain a petition for rehearing "is limited by the expiration of the term . . . and **not by the period allowed for appeal**". This court there further held that in bankruptcy there are no terms and therefore that right is not limited by the expiration of the term. The **appellate court** in the *Clarke* v. *Hot Springs* case **did not dismiss the appeals**—there were four of them which they decided on the merits.

Respondents' Brief Page 25.

McIntosh v. *United States*, CCA 4, 1934, 70 Fed. (2d) 507. Case Number 4 in the list cited at page 15 and discussed at page 25 of respondents' brief.

This case has been discussed at page 37 of this reply brief.

Respondents' Brief Page 26.

Northwestern v. *Pfeifer*, CCA 8, 1929, 36 Fed. (2d) 5. Case Number 6 in the list cited at page 16 and discussed at page 26 of respondents' brief.

This decision has been discussed at page 37 of this reply brief.

Respondents' Brief Page 26.

Larkin v. *Hinderliter*, CCA 10, 1932, 60 Fed. (2d) 491. Case Number 7 as cited at page 16 and merely cited as "In accord" at page 26 of respondents' brief.

This decision has been discussed at page 38 of this reply brief.

This ends the discussion of the thirteen cases cited on page 16 of respondents' brief.

Respondents' Brief Page 27.

Bowman v. *Lopereno*, 1940, 311 U. S. 262. Again it must be observed that the author of respondents' brief has misread the opinion he relies upon. It is sufficient to refer to the quotation from page 266 of the opinion which is quoted at page 8 of the supplemental brief, namely: "Treating . . . the petition of November 15, 1937, as **a second petition for rehearing filed out of time**" . . . "**These circumstances enlarged the time for taking appeal**". . . .

Respondents' Brief Page 28.

Gypsy v. *Escoe*, 1927, 275 U. S. 498. Again it must be suggested that the decision relied upon has been misread.

It is true that a petition for rehearing was filed within time (three months) for applying for certiorari and denied, within time, on June 14. But as the court said, "On September 30, 1927, **more than three months after denial** of the petition for rehearing (June 14), **the present petition for certiorari was filed.**"

It is true that on June 18, still within time, an application for **leave to file** a second petition for rehearing was filed, and later, denied after time. But an application for **leave to file** an application for rehearing **is not the filing of a petition for rehearing** and does not have the effect of one. This court said that "the mere presentation of a motion **for leave to file**" does not have the effect of suspending the time for seeking a review.

This court went on to suggest to the petitioner how, within the applicable long established rule of law, another application for certiorari could be seasonably filed. It said that if **leave to file a second petition for rehearing** was granted and the **petition** was actually **entertained, "then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition" for rehearing.**

This court was but repeating the distinction it had already clearly explained in *Morse* v. *United States*, 1926, 270 U. S. 151, at page 153, as noted in petitioner's supplemental brief, page 29, at page 30, last paragraph, in the discussion of that opinion. The quotation on the point is at the top of page 30 of the supplemental brief.

Where a court actually entertains a petition for rehearing without expressly granting leave to file such leave is conclusively presumed. See *Aspen* v. *Billings*, 1893, 15 U. S. 31, quoted in this point in the discussion of the case in petitioner's supplemental brief, page 3, number 4, at the top of page 5. Counsel does not have access to the official paging of the decision but it is at 37 L. Ed., page 988, lower half of second column preceding paragraph numbered 3. See also *Kingman* v. *Western*, 1898, 170 U. S. 675 at page 678. The applicable quotation on this point is copied into the discussion of the case in petitioner's supplemental brief at number 29, page 23, in the middle of the larger quotation in the middle of page 24.

Reply to Respondents' Brief Top of Page 9.

Respondents say: That when a petition for rehearing filed after time for appeal is denied, the right of appeal is lost.

This statement is not supported by a single decision of this court except in the *Conboy* case decided thirty-six years ago—never followed, characterized by this court in *Wayne* v. *Owens-Illinois* as "indicisive" and there clearly repudiated and the decisive lower court contrary decisions upheld and extended. *Wayne* v. *Owens-Illinois*, 300 U. S. 131, 133, Note 2.

In the great number of decisions of this court which establish the simple rule that the denial of a petition for rehearing of an order which is entertained by the court destroys the finality of that order and starts the running of time to seek review, there is not one which holds that it is necessary that the court shall formally reopen the case,

set its order aside and enter a new judgment restoring it. The *Wayne* v. *Owens-Illinois* case did not so decide. It happened that such was the method of procedure in the District Court but **the issue was whether the filing of an application for rehearing after the time for appeal** invoked the rule that its denial started the running of time for appeal. This court held that it did.. It is sufficient, as has been often said by this court, if the court **"entertain"** the application for rehearing. Webster says that entertain means to receive and take under consideration, as to entertain a proposal.

There is very sound reason for sustaining the rule. If lower courts should be trammeled in their freedom to re-examine their orders, the burden upon reviewing courts would become intolerable and crowd out the proper consideration of carefully considered but erroneous decisions. The vast majority now freely act upon the rule. The bar has so understood it and it is embodied in the standard text books. See the quotation from Hughes "Federal Practice", Section 5698 and that from Mr. Mitchell, Chairman of the Committee which formulated the Rules of Federal Procedure, both quoted at page 62 of petitioner's Brief. The abandonment of this rule which has been commonly recognized from the inception of American jurisprudence would be the most calamitous decision ever pronounced by this court and would inevitably result in reviews of orders not exhaustively considered in the courts of their origin.

In the Pfister petitions for rehearing the conciliation commissioner not only (1) "entertained" them but (2) denied motions to dismiss them on the ground there was no jurisdiction to consider them (3) received voluminous pleadings and counter pleadings, (4) held hearings and

(5) "considered the whole proceeding." See the Brief page 36, "Petitions for Rehearing and Their Denial" and reference there cited.

Reply to Respondents' Brief Page 29.

That the orders of September 7 ordering sale of the farmer debtor's cows, implements and feed were "consent orders".

We do not believe that this suggestion is seriously relied on. We think it is lugged in as a desperate expedient. The answer runs through all that has aready been said. But lest it might be considered that possible some of the decisions brought forward by the respondents would countenance such a conclusion in the instant case we briefly discuss them.

Curry v. *Curry*, CCA DC, 1935, 79 Fed. (2d) 172, page 30 of respondents' Brief. Divorce case. Wife through counsel entered into a separation agreement and obtained a decree. After paying the stipulated and awarded alimony for a long time the divorced husband, who had remarried, became financially embarassed and could not pay, whereupon the wife brought suit to annul the divorce and the separation agreement in order to bring criminal action. The court held she had irrevocably ratified the separation agreement and the divorce. Mr. Pfister ratified nothing. His counsel did not even have any of the orders presented before entry.

Bergman v. *Rhoades*, 1929, 334 Ill. 143. In the settlement of an estate legatees by counsel agreed to take land instead

of money because it was found that a money settlement was impracticable. Their fully authorized counsel who had represented them for years participated in the agreement, the report and the application to the court. There was no disability and no lack of authority or knowledge.

Union Central v. *Anderson*, 1937, 291 Ill. 423. In mortgage foreclosure the mortgagee gave notice of appeal and then proposed settlement. It secretly instructed its counsel to abandon appeal and "watch for expiration of time". A written stipulation was drawn by counsel and the mortgagee kept it until one day after the mortgagor's time for appeal expired, and then refused to sign it, leaving the foreclosure naked. The mortgagor brought suit to cancel the mortgage alleging a trap by the mortgagee. The mortgagee was held to the stipulations made by its counsel, invoking "equitable estoppel". It said "Appellant makes reference in its brief to cases of authority and precedent, but none where the circumstances are such as exist in this case. The court can not permit its judgment, orders and decrees to thus be made the object of a designing litigant . . . . Precedent can not thus be permitted to embalm principle."

The pronouncement is commended to respondents.

Clemens v. *Gregg* (California), 1917, 167 Pac. 294, cited in respondents' brief at page 33. After acting upon a consent decree in the settlement of a foreclosure action by making payments for four years one party objected. It was held the consent decree had been fully ratified.

American v. *Industrial*, 1929, 235 Ill. 332, cited in respondents' brief at page 33. Industrial compensation case. Controversy by employer over name of widow, whether it

was Mrs. Hupka or Mrs. Kupka. Throughout the case she was "Mrs. Kupka" without objection by the employer who so referred to her in cross interrogatories. After judgment the employer urged that the identity of "Mrs. Kupka" was not established. The court held it was estopped.

Lyon v. *The Perin*, 1889, 125 U. S. 839, cited in respondents' brief at page 34. Patent suit, regularly set for trial, came on for hearing and was submitted on pleadings. The court found and decreed that "the equities are with the defendant; that the bill be dismissed." The plaintiff brought another suit in another jurisdiction involving the same parties and the same subject matter. It was held the first suit was *res judicata*.

Reply to Respondents' Argument at Page 35 that "Proper notice of all proceedings herein was given debtor under the rules of court."

There was no notice whatever of the order of August 13 to pay $12,750 in 2 years, 8 months and 13 days. The motion of the respondents was made therefor and granted the same day. R. 9, entry of August 13, 1940. As to the "perishable" orders of "September 7", it is very seriously questioned whether they were actually entered on September 7. At any rate they were never presented to counsel. See pages 19 to 24 of this reply brief.

The suggestions of respondents are conclusively answered by *Borchard* v. *California*, 1940, 310 U. S. 311, where for four successive crop seasons the mortgagors and mort-

gagee agreed between them that payments should be made directly by the mortgagors to the mortgagee. They presented each agreement to the bankruptcy court which approved each one of them by a formal order. No review was ever sought. Upon such facts this court observed that:

> Page 317: "Instead of prosecuting the cause before the conciliation commissioner pursuant to the debtor's petition, the bank resorted to a procedure not contemplated by the statute, evidently **on the theory that it could obtain some advantage by that course.**"
> Page 318: "The petitioners were entitled to compliance with the procedure required by the statute."

Respondents fail to recognize the **purpose** of Section 75.

Respectfully submitted,

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Lima, Ohio
March 24, 1942